

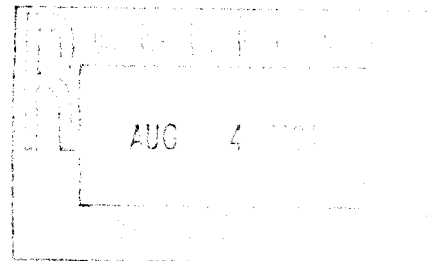
**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
Respondent	)		MPC 87-0703

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR
ACCESS TO PATIENT RECORDS AND PATIENT EXAMS**

In his most recent attempt to create delay and avoid accountability, Respondent has moved the Board to exclude the testimony of those patient-witnesses who have refused to grant Respondent unlimited access to their medical records and/or who have refused or will refuse to undergo an independent eye examination. Of course, if the Board were to grant such a motion the State's case in these matters would be effectively gutted. In addition the Respondent asks the Board to order the Attorney General's office to cease discussing the case with attorneys representing some of the complaining witnesses. As with his previous motions, the motion lacks merit and must be denied for reasons set forth below.

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A. BECAUSE PATIENT WITNESSES ARE NOT REQUIRED BY DUE PROCESS OR BY STATUTE OR RULE EITHER TO GRANT RESPONDENT UNFETTERED ACCESS TO THEIR MEDICAL RECORDS OR TO SUBMIT TO AN INDEPENDENT MEDICAL EXAMINATION, THEIR TESTIMONY CANNOT BE EXCLUDED AT HEARING.

As acknowledged by Respondent, "the Board cannot force the State's witnesses to submit to an eye examination or to produce their medical records to [the Respondent]." Respondent's Memorandum in Support of Motion, p.3. Respondent therefore admits that he has no legal right to the records or to the independent examination, yet insists the Board must exclude the testimony of those patient witnesses who did not grant to Respondent that to which he is not entitled. The Respondent's argument simply makes no sense. It is clear what Respondent truly seeks to accomplish is to eliminate that portion of the State's case that truly threatens the Respondent--the testimony of the patient-witnesses. The Board cannot grant Respondent the remedy he seeks.

A. Respondent Has All Medical Records That Were Received By The Board In The Course of Its Investigation Of The Complaints Of The Patient-Witnesses.

Respondent desperately seeks to convince the Board that he is operating under unfair constraints because he is not granted the same access to medical records that the Board was granted in order to conduct its investigation. This is not the case. Every medical record of the patient-witnesses that Board received in the course of its investigation of the complaints of the patient-witnesses has been given to the Respondent.

There is simply no reason for the Respondent to have unfettered access to the entire medical records of the patient-witnesses. The proposed release drafted by Respondent would give the Respondent access to documents such as mental health records--records that are totally irrelevant to the Board proceedings. Moreover, if the Respondent thought these records had any relevancy to his treatment of these patients why did he not request access to the records during treatment. Indeed, one could easily interpret the attempts by the Respondent to extract such releases from the patient-witnesses as retaliation for the their filing of complaints with the Board.

The Board's statute and rules grant Respondent access only to the information possessed by the Board. Respondent has received what statute and rule require. However, Respondent overreaches by seeking more than that to which he is entitled. To boot, Respondent asks the Board to decimate the State's case by prohibiting the testimony of patient-witnesses because he is not receiving what he has no right to receive. Respondent's motion is a naked attempt to vitiate the State's case and harass the patient-witnesses and must be denied.

B. Respondent Has No Right to Subject Patient-Witnesses To Independent Eye Examinations.

The arguments made in Section I(A) above regarding Respondent's access to the medical records of patient-witnesses can be applied with equal force to Respondent's attempt to subject the same witnesses to independent eye exams. Once again, the Board rules and statutes do not provide a mechanism for what Respondent seeks. Yet the Respondent would have the Board prohibit testimony from any patient-witness who does not accede to Respondent's request for an eye

examination. As he has in all of his filings with the Board, the Respondent creates an entitlement and remedy which are not based on any objective legal right but instead on the Respondent's own subjective and self-serving notion of what constitutes fundamental fairness. Respondent is not entitled to subject patient-witnesses to independent eye exams and his motion to exclude the testimony of patient-witnesses must be denied.

C. Excluding Patient-Witness Testimony For Reasons Argued By Respondent Is In Derogation of Sound Public Policy.

The most important reason the Board must deny Respondent's motion to exclude the testimony of the patient-witnesses is that the motion is antithetical to sound public policy. Patients have come forward and filed complaints against Respondent and the State has determined that the complaints are sufficient to form the basis of charges of unprofessional conduct. Respondent would have the Board extract as the price for the civic duty performed by these patients a grant to Respondent of unfettered access to traipse through their medical records and to subject them to unwarranted and unrequired medical examinations. If the Board grants Respondent's motion and excludes the testimony of patient-witnesses for reasons argued by Respondent it will set a precedent that will forever discourage patients from filing complaints against physicians. Sound public policy demands that the Board deny the Respondent's motion to exclude the testimony of patient-witnesses who do not accede to Respondent's request for access to medical records and independent eye examinations.

II. STATE IS FREE TO COMMUNICATE WITH ATTORNEYS FOR PATIENT-WITNESSES.

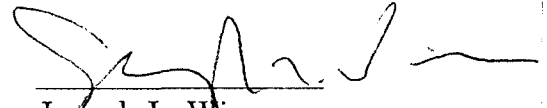
In Respondent's ceaseless attempt to create superficial distractions, he spends an inordinate amount of space in his memorandum trying to paint the State's communications with attorneys for the patient-witnesses as a sinister conspiracy. Because the patient-witnesses are represented by counsel, the State has no choice but to communicate to the represented patient-witnesses through their attorneys. To do otherwise would be a violation of the Code of Professional Responsibility. In any event the Board has no authority to halt the State's interaction with attorneys for the patient-witnesses as requested by the Respondent.

There is one aspect of Respondent's argument on this issue that should be addressed. Respondent arrogates to the Attorney General's office a duty of impartiality. Respondent Memorandum, p. 15. Respondent bases the duty on his mistaken notion that the Attorney General's office is a prosecutorial arm of the *Board*. Respondent's Memorandum, p. 14. The Attorney General's office is no more a prosecutorial arm of the *Board* than a State's Attorney office is a prosecutorial arm of the District Court. The Attorney General's office in these proceedings advocates for the public interest on behalf of *the State* before the Board. There is no logical argument that the Attorney General's office be impartial and an advocate at the same time. It is the Board, not the Attorney General's office, which has the duty of impartiality.

WHEREFORE, the State asks that the Respondent's motion be **DENIED**.

Dated at Montpelier, Vermont this 2nd day of August, 2004.

**WILLIAM SORRELL
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BY**



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